United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

76-1299

To be argued by
ANGELO T. COMETA

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

against

SIDNEY STEIN,

Defendant-Appellant.

On Appeal from an Order of the United States District Court for the Southern District of New York

BRIEF FOR APPELLANT

PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
Attorneys for Defendant-Appellant
40 West 57th Street
New York, New York 10019
(212) 977-9700

Of Counsel:
LOUIS NIZER
ANGELO T. COMETA
PERRY S. GALLER
JONATHAN D. WARNER

TABLE OF CONTENTS

TABLE OF CASES AND STATUTES

Statutes

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

SIDNEY STEIN,

Defendant-Appellant.

Docket No. 76-1299

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ISSUE PRESENTED

Whether it was an abuse of discretion for the Court to sentence appellant to consecutive five-year terms in reliance upon material misinformation which appellant had no opportunity to rebut and upon a probation report that was erroneous and out-of-date.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from an order, dated March 9, 1976, denying appellant's motion for reconsideration of his motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure, to reduce his sentence, which was denied October 22, 1975, from a conviction rendered March 28, 1975 upon his plea in the United States District Court for the Southern District of New York (The Honorable Constance Baker Motley), finding appellant guilty under indictment number 74 CR 573 of conspiracy to sell unregistered securities in violation of 17 U.S.C. 371 (Count One), using interstate commerce and the mails to sell unregistered securities in violation of 15 U.S.C. 77j;(Count Seven), and interstate transportation of unregistered securities in violation of 15 U.S.C. 77e (Count 14).

Appellant received a $10,000 fine and a five-year term for the conspiracy, a $10,000 fine and a concurrent two-year term for the use of interstate commerce and the mails to effect the securities fraud, and a $5,000 fine and a consecutive five-year term for interstate transportation of the securities. His sentence totalled $25,000 in fines and ten years imprisonment.

STATEMENT OF FACTS

Appellant is a fifty year old man who has confessed his involvement during the 1960's in the violation of federal securities laws. All of these violations ceased prior to 1972. When appellant was informed in 1974 that he might be indicted for the offenses for which he now stands convicted,* offenses committed in 1968 and early 1969, he was already making amends for his past misdeeds, by assisting numerous governmental agencies, including the Justice Department, the FBI and the IRS, as an undercover agent and informant in investigations.

Appellant became a principal witness for the government before the Grand Jury that returned the instant indictment. He pleaded guilty to three counts and agreed to testify as a government witness at the trial of his co-defendants. During the course of the eight-week trial, his co-defendants and their attorneys did everything possible to discredit him in cross-examination and in side-bar

---

* On June 4, 1974 appellant and nine co-defendants were charged in a twenty-count indictment, 74 CR 573, with conspiracy to violate the registration and antifraud provisions of the federal securities laws and mail and wire fraud statutes and with numerous substantive violations thereof. The charges involved a scheme to sell unregistered stock and manipulate its price.

conferences, both in and out of the presence of appellant. Appellant had no opportunity to rebut these accusations by presenting evidence in his own behalf. Shortly after the trial, appellant appeared for sentencing. The Assistant United States Attorney submitted a sentence memorandum elaborating on appellant's extensive cooperation with the government and acknowledging that appellant had led a law abiding existence for a period of at least three years.

Relying upon a four-year old, erroneous probation report and upon the charges levied by co-defendants at the trial, the Court imposed the maximum penalties under the law on each of the three counts, and, in addition, directed that two five-year terms run consecutively. In contrast, all but one of the co-defendants found guilty after trial received suspended sentences, and that one received concurrent three-year sentences.* Neither appellant nor his counsel were permitted to address the Court to respond to the factors upon which the Court expressly relied.

---

* A complete account of the criminal plan is available in this Court's opinion affirming the convictions of four of the co-defendants, United States v. Rubinson, _____ F.2d _____ (2nd Cir. 1976), slip opinion p. 3119, (April 8, 1976).

Appellant moved for reduction of sentence, claiming among other things that the Court was seriously misinformed in its reliance upon a four-year old probation report which was replete with inaccuracies and with speculations that had proved false, and in its reliance upon unsupported accusations heaped upon him by his co-defendants at the trial. In response to the motion, the government reaffirmed its earlier testimonials as to the appellant's rehabilitation and extensive cooperation. The government specifically noted how unusual it was for a securities violator to reform as appellant had done, and it recommended that appellant receive favorable consideration on his motion. The government said it would not oppose a reduction of the sentence to five years.

Nevertheless, the Court denied the motion to reduce, together with the request for oral argument, without explanation.

Appellant moved for reconsideration of the motion to reduce and once again for oral argument. The government affirmatively recommended that the sentence be reduced to a term of imprisonment of approximately five years or, in the alternative, that appellant become immediately eligible for parole pursuant to the provisions of 18 U.S.C. §4208(a)(2) or §4208(a)(1).

Despite these extraordinary recommendations, the Court denied the motion stating,

> "Petition for reconsideration denied. See Court's statement at the time of sentence."

Thereafter, appellant filed notice of appeal.

The Sentencing

When appellant appeared for sentencing, the Court noted that the

> pre-sentence report is a three and a quarter page report which updates apparently a prior pre-sentence report in this court relating to Mr. Stein's prior conviction. It says on page 2, "Please refer to the attached pre-sentence investigation prepared during 1971 in connection with proceedings under indictment 66 Crim. 732." So that this particular pre-sentence report doesn't contain much additional information other than that report. (Pages 3-4, Minutes of the Pre-Sentence Conference in Chambers, dated March 28, 1975). [emphasis supplied].

That earlier report had been submitted to Judge Frederick Van Pelt Bryan of the United States District Court for the Southern District of New York upon appellant's conviction for a securities violation which had occurred in 1961 and for which he had been indicted in 1966. Pursuant to that conviction, appellant had received a two-year sentence, subsequently reduced in January 1973 to time served and a five-year probationary term.

By the time of sentencing in the instant action, appellant had already served more than two years of the probationary term under the supervision of the probation office of the United States District Court for the Southern District of Florida, the place of appellant's residence. Defense counsel noted that during these two years appellant had conducted himself with complete propriety and asked that no jail term be imposed (S.3).* Appellant told the Court that he understood the pain of imprisonment and that he was continuing to rehabilitate himself. He wanted to make a new place for himself and would continue to cooperate fully with the Government (S.6.). The prosecutor referred to the Government's sentence memorandum, which gave an extensive report of appellant's cooperation, and included several letters from the governmental agencies which appellant had assisted. The memorandum confirmed appellant's contention that he had been acting commendably for the last three years (GSM.4).**

---

*"S" refers to the sentence minutes dated March 28, 1975.

**"GSM"refers to the Government's Sentence Memorandum submitted to the Court prior to sentencing on this indictment.

Although the Court declared that it was fully apprised of appellant's cooperation (S.7), it, in fact, accepted and relied upon a four-year old, 1971 pre-sentence report and quoted it verbatim for some three and a half pages of the sentence minutes (S.8-11). This report concluded that,

> There is a history and pattern of this [appellant's] behavior with three cases, including one for forgery about to break open in this court, all leading to considerable prosecution (S.9) [emphasis supplied.]
>
> * * *
>
> In any event, it certainly appears that Stein has learned little about himself in the process and will continue to act in a fraudulent and manipulative manner. He shows no remorse for his involvement and indicates that he is innocent not only of the instant offenses but of other offenses (S.10).

In addition, the Court acknowledged that it was also relying upon statements which it had heard at the co-defendants' trial.

> [D]uring the course of the trial there was also testimony about your activities following the sentence imposed by Judge Bryan which related to attempted suicide on your part and attempts to get a sentence fixed which, of course, comes after your involvement in this case.

> The testimony which I heard leads me to the conclusion that what you attempted in 1972, whenever that was, was an attempt to avoid going to jail by feigning suicide (S.11).

Thereupon, the Court imposed a five-year term and a $10,000 fine on Count 1 (conspiracy to sell unregistered securities and manipulate the price), and a concurrent two-year term and a $10,000 fine on Count 7 (using the mails in furtherance of the fraud for the purpose of selling unregistered securities), and a consecutive five-year term and a $5,000 fine on Court 14 (interstate transportation of unregistered securities).

Both appellant and his attorney attempted to address the Count, but the Court refused to hear anything more from either of them and ordered appellant remanded immediately (S.13-13a).

Motion for Reduction in Sentence

Having been precluded from addressing the Court after sentence was imposed, appellant moved to reduce the sentence, specifically calling the Court's attention to, among other things, the Court's statements at sentencing that appellant had earlier attempted to fix his sentence before Judge Bryan and that appellant had faked suicide in

order to avoid incarceration. The charge that appellant was a "fixer" and a "faker" had been made by counsel at the co-defendants'trial. In attempting to destroy appellant's credibility, co-defendant's counsel claimed that appellant

> went to Dr. Quase, Winston Childs, Evans North, and he offered them money...$100,000, if they could have his two-year sentence reduced.
>
> They said they could. He paid them a check of $10,000 and they were working on it. When he realized they were phonies and couldn't fix his case, then and only then did he come to the Government and offer to make a case on these individuals. (T.4048).*

Appellant denied these charges but, as a witness, he could present no evidence. However, the charges were addressed by the government in its sentence memorandum to Judge Motley in the instant case. The memorandum brought to the Court's attention the letter of John R. Wing, Assistant United States Attorney for the Southern District of New York, written to Judge Bryan in October 1972, regarding the attempted obstruction of justice by the very parties referred to by co-defendants' counsel.

---

*"T" refers to the minutes of the co-defendants' trial under this indictment. Selected portions of the trial transcript have been stipulated part of the appendix on this appeal.

> Stein assisted in this investigation by meeting and speaking with the subjects on a number of occasions during which time he led them to believe that he would pay a substantial sum in order to avoid serving the prison sentence imposed in his case. There was also conversation between Stein and the subjects about the possibility of fixing a perjury case which is presently pending against Stein. ... Stein cooperated fully in this investigation ...(GSM. Exhibit 1).

On the motion to reduce the sentence, appellant furnished further evidence to the Court that the "fix" accusations were untrue, quoting the statement of Assistant United States Attorney Jerry Feffer to Judge Bryan at a hearing on January 30, 1973 (MMS. 11).

Likewise, with respect to the charge that appellant had faked suicide in October 1972, to avoid serving Judge Bryan's sentence, appellant offered substantial evidence that his suicide was not feigned (MMS. 15-18).* He had a psychiatric history dating from 1951 of severe depression, for which he even received shock treatments in 1964 (MMS. 16).**

---

*"MMS" refers to the memorandum submitted with appellant's motion to reduce his sentence.

**Appellant's continuing psychiatric difficulties were presented on the motion to reduce sentence and to reconsider the motion. Dr. David G. Pinosky advised the court by letter, dated November 24, 1975 that appellant was in need of "emergent psychiatric intervention" to resolve his suicidal inclinations (PRM. Exhibit A). A letter dated June 18, 1976 from Dr. Pinosky updating appellant's psychiatric condition has been stipulated part of the record and states that appellant's psychological decompensation is resulting in progressive emotional and physical deterioration. "PRM" refers to the petition to reconsider the motion to reduce sentence.

Only three months before his suicide attempt, appellant was treated as an "emergency" for "depressive reaction" by Dr. William A. Leone, who said:

> In light of my findings at this time, I must express concern for the man's mental health. The potential for suicide is present now. With appropriate treatment, it may be averted. (MMS. Exhibit 2, p.2).

Appellant was thereafter seen for psychological testing by Dr. Norman Reichenberg, who concluded that the results "suggest paranoid schizophrenic underpinnings in an individual who is forced to keep 'running' if he is to avoid serious regression." (MMS. Exhibit 3, p.2). Shortly thereafter, in October 1972, Judge Bryan ordered him to surrender but permitted him time to say goodbye to his family in Miami. It was on this flight that appellant attempted suicide.

Co-defendants' counsel frequently stressed at the trial that the incident was a fraud, especially because appellant had been accompanied on the flight by a friend who had him taken to a hospital after the flight landed (T. 4057). One of the co-defendants, acting as his own counsel, told the Court that appellant had even told him of a plan for the suicide attempt (MMS. 15).

While one of the presecutors expressed the opinion at that time that the suicide was a fake, the Court was expressly advised by the prosecutor in the instant case that that opinion was subsequently "undercut" by the findings of the psychiatrists at the Federal Medical Institute at Springfield, Missouri, where appellant was committed by Judge Bryan for further study (T. 4358). The report of the psychiatrists, which was before the Court at the co-defendants' trial, supported appellant's contention that he truly attempted suicide.

> Recent psychological testing and psychiatric observation substantiate that Stein does possess a degree of paranoia which is on the verge of developing into schizophrenic psychosis. His depression is almost at the psychotic level. At this time he is still in contact with reality but the possibility of incarceration poses such a threat to him that he could easily decompensate at any time. The possibility of further suicide attempts is realistic in this case, as it is believed that the recent previous gesture was prompted by the fear of confinement, and incarceration may yet be imminent.
>
> At the Medical Center he has been observed as suffering from a very severe affective disorder, as depicted in available reports. As suggested above, total personality disintegration has not occurred, yet he is tenuously close to a total break from reality (MMS. 18).

Appellant also addressed himself in the motion to reduce the sentence to the Court's mistaken reliance upon

the 1971 probation report. Not only did this report conclude that appellant both would continue his course of illegal conduct and had shown no remorse (S. 10), but it also accused appellant of committing forgery (S. 9). Appellant was never charged with this crime, and by 1975 there was no evidence of his ever having committed it.

The government conceded that the probation report's speculation about appellant's future unlawful conduct was untrue. Appellant had acted lawfully since at least 1972 (GSM. 4). Moreover, the Government offered ample evidence of appellant's reformation and cooperation.*

---

* This rehabilitation was also confirmed by Joseph F. Job, the Sheriff of Bergen County, New Jersey, in a letter dated October 3, 1975, submitted on appellant's motion to reconsider the motion to reduce sentence. Because of security problems in placing appellant in a regular federal prison, due to his continued assistance to the government, he has served most of his term in the Bergen County Jail Annex, a small institution where Sheriff Job has had the opportunity to observe him on a continuous basis. Sheriff Job concluded:

> "It is my opinion that any further jail term would serve no useful purpose as far as this individual is concerned since I consider him fully rehabilitated and one who can assume his role in society as a responsible and capable citizen." (PRM. Exhibit B) [Emphasis added]

Appellant was an undercover agent for the Bureau of Narcotics and Dangerous Drugs against attorneys who were trafficking in drugs (GSM.Exhibit 1, p.1). He aided the FBI in the aforementioned investigation of obstruction of justice and the Justice Department in an inquiry into payments to an investment advisory service in return for its promotion of stocks (GSM. 4-6) He was used by the FBI to penetrate a loanshark operation involving stolen securities,at great risk to his personal safety (GSM.Exhibit 3) and by the IRS and the Organized Crime Unit of the Justice Department to develop intelligence information. (GSM.Exhibits 4 and 5). All of these agencies attested to the considerable aid volunteered by appellant between 1972-1975 (GSM.Exhibits 1-5). Moreover, the Government has conceded on this appeal that appellant's cooperation in additional investigations is continuing to this very date,even while he is incarcerated.

Nonetheless, the Court twice refused to reduce appellant's sentence citing once again the comments and conclusions which it had stated at the time of sentencing.

ARGUMENT

IT WAS AN ABUSE OF DISCRETION FOR THE COURT TO SENTENCE APPELLANT TO CONSECUTIVE FIVE-YEAR TERMS IN RELIANCE UPON MATERIAL MISINFORMATION WHICH APPELLANT HAD NO OPPORTUNITY TO REBUT AND UPON A PROBATION REPORT THAT WAS ERRONEOUS AND OUT-OF-DATE.

Following his guilty plea on three counts of this indictment, appellant was the principal witness in the trial of his co-defendants. He was subjected to unrelenting cross-examination aimed principally at discrediting him personally. Side-bar conferences out of his presence contributed to the well of misinformation which flooded the Court over an eight-week period. Having been irretrievably misinformed by the end of the trial, the Court was further misled by an erroneous, out-dated and incomplete probation report.

Relying upon all of this misinformation, the Court imposed two consecutive five-year terms. It later refused to lessen this harsh penalty despite the government's recommendation that it be substantially reduced.* Although a sentence imposed by a federal district judge is not generally subject to review, Dorszynski v. United States, 418 U.S. 424, 431 (1974), it is well-settled that a sentence

---

*In marked contrast, the co-defendants who showed no contrition and who forced the government through the expense and ordeal of an eight-week trial received suspended sentences, except one co-defendant, who received three years imprisonment.

predicated upon information which is materially false cannot stand. Townsend v. Burke, 334 U.S. 736, 741 (1948); United States v. Seijo, _____ F.2d_____ (2d Cir. 1976), slip opinion, 4395, 4398 (June 24, 1976). As this Court held, in vacating the sentence of the defendant in United States v. Malcolm, 432 F.2d 809, 816 (2d Cir. 1970),

> Misinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process.

The misinformation in the instant case included:

(a) the Court's expressed belief that appellant had tried to "fix" a case in 1972;

(b) the Court's conclusion that appellant had feigned suicide to avoid incarceration;

(c) the speculation of the probation report, accepted by the Court, that appellant would continue to act in a fraudulent and manipulative manner;

(d) the report's further accusation that appellant had shown no remorse or rehabilitation; and finally,

(e) the report's charge that appellant had committed forgery.

All of these considerations were entirely untrue.

(a) Appellant had certainly not tried to fix any case. What is most startling about the Court's conclusion is that it necessarily ignored the statements of two different Assistant United States Attorneys, which rebutted this charge. These statements specifically noted that appellant had been approached by a lawyer to obstruct justice. Appellant immediately contacted the government and followed its directions as an undercover agent in an investigation of this attempt. Through appellant's efforts, an indictment was returned against these individuals. Despite the government's own position concerning appellant's conduct, the Court relied upon completely unsubstantiated assertions by co-defendants' counsel at trial that appellant had been the "fixer" and not the agent of the government.

(b) The weight of the evidence undermines the Court's belief that appellant feigned the attempted suicide. Appellant had a long history of psychiatric disturbances. His fear of incarceration, according to the physicians who treated him, reached paranoid schizophrenic proportions. Shortly after the suicide incident, a team of government psychiatrists unanimously agreed that appellant "was but a step away from total personality disintegration and possible psychosis." (MMS. 18) Under these circumstances, the

Court was gravely in error when it relied upon an affidavit prepared before the examination by the government's psychiatrists and upon allegations at side-bar conferences during the trial, notwithstanding the judgment of the psychiatric experts.

Moreover, appellant had no oportunity to rebut either of these charges. Following the Court's statements, sentence was imposed and he was remanded without further opportunity to be heard. In the United States v. Powell, 487 F.2d 325, 329 (4th Cir. 1973), the Court of Appeals vacated a sentence that was based on the belief that the defendant was the ringleader of the group and stated:

> The district judge did not disclose that he believed Powell was the ringleader and the cause of his brothers' involvement until after Powell's counsel had addressed the court and Powell had exercised his right of allocation. Immediately after the disclosure, without reopening the proceedings for further argument or explanation, the court pronounced sentence. Thus, Powell was denied the opportunity to explain or refute the charge before he was sentenced. These two defects of the sentencing procedure -- failure of the record to support material factors on which the severity of the punishment rested, and Powell's lack of an opportunity to explain or refute the derogatory information on which the judge relied -- denied Powell due process of law. Cf. Townsend v. Burke, 334 U. S. 736, 68 s.ct. 1252, 92 L.Ed. 1690 (1948); United States v. Malcolm, 432 F.2d 809, 816 (2d Cir. 1970).

Similarly, in Collins v. Buchkoe, 493 F.2d 343, 345 (6th Cir. 1974), the Court, in vacating defendant's sentence, held:

> While the discretion of the sentencing Judge is broad with respect to the nature and source of information utilized by him in sentencing there are nevertheless, limitations imposed by the requirements of due process. These limitations include the requirement that a defendant be afforded the opportunity of rebutting derogatory information demonstrably relied upon by the sentencing Judge, when such information can, in fact, be shown to have been materially false.

In accord, United States v. Looney, 501 F.2d 1039, 1042 (4th Cir. 1974), where the Court vacated sentences based on false information which defendant had no opportunity to challenge.

(c) The Court's reliance upon the 1971 probation report was misplaced. Appellant had certainly not continued to "act in a fraudulent and manipulative manner." The government's sentence memorandum and appellant's motion to reduce bore vivid witness to appellant's reformation and his unblemished record since the preparation of that probation report.

(d) The 1971 report stated that appellant had shown no remorse. By 1975, this statement was untrue. He had already been in prison for almost three months, in solitary confinement,

and served more than two years probation. During this period he was cooperating continually with federal agencies. The 1975 probation report merely referred the Court to the 1971 report without discussing appellant's change of attitude during this period and did not contain any impressions of the probation officer who supervised appellant for two years in Florida. It is difficult to conceive how a person could evidence more remorse than appellant under the circumstances.

(e) The accusation in the 1971 report that appellant had committed forgery was completely false. That no such charge had been brought against him by 1975 should have caused the probation office to correct this error. It was impermissible for the Court to consider this material inaccuracy in imposing sentence.

Under these circumstances, there was no adequate probation report before the Court prior to sentencing. The probation report that was produced here was four years out-of-date. This fact alone mandates that the sentence be vacated. As the Court of Appeals in Rewak v. United States, 512 F.2d 1184, 1186 (9th Cir. 1975), held in vacating defendant's sentence

> The required pre-sentence report must be up-to-date. United States v. Carmichael, 152 U.S. App. D.C. 197, 469 F.2d 937, 939 (1972).

Moreover, reliance upon the erroneous conclusions contained in the 1971 report, expressly with respect to the charge of forgery, constituted abuse of discretion requiring that the sentence be vacated. United States v. Tucker, 404 U.S. 443 (1972). As this Court stated in United States v. Malcolm, supra, at p. 819.

> Fair administration of justice demands that the sentencing judge will not act on surmise, misinformation and suspicion but will impose sentence with insight and understanding.

Accordingly, this case must be remanded to a different District Court Judge for resentencing.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE SENTENCE MUST BE VACATED AND THE CASE REMANDED FOR APPELLANT TO BE RESENTENCED BEFORE A DISTRICT COURT JUDGE OTHER THAN THE ONE BEFORE WHOM HE WAS ORIGINALLY SENTENCED.

Respectfully submitted,

PHILLIPS, NIZER, BENJAMIN, KRIM
& BALLON
40 West 57th Street
New York, New York 10019
212/977-9700

Attorneys for Defendant-Appellant

Of Counsel:
Louis Nizer
Angelo T. Cometa
Perry Galler
Jonathon D. Warner

Service of a 2 copies of the
within ____ is hereby
admitted this ____ day of
____ 19 __

Signed ____

Attorney for ____